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Supreme Court, U.S.
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No. 97-544

In The

Supreme Court of the United States

October Term, 1997

NOVA DESIGNS, INC. d/b/a
PERFORMANCE DIVER,

Petitioner,

v.

ELECTRONICS INSTRUMENTATION &
TECHNOLOGY, INCORPORATED and
BEUCHAT USA, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN C. BUTTERS
Attorney for Petitioner
P.O. Box 7129
Atlanta, GA 30357-0129
(404) 872-5693
(404) 876-3331 (Fax)
(Counsel of Record)

JAMES F. PONSOLDT
Of Counsel
Univ. of GA.
School of Law
Athens, GA 30602
(706) 542-5209

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

9 PP

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

I.

THE NINTH CIRCUIT'S ALLOWANCE OF PIECEMEAL APPEALS IS IN CONFLICT WITH RECENT ELEVENTH CIRCUIT AND SEVENTH CIRCUIT DECISIONS DISMISSING PIECEMEAL APPEALS FOR LACK OF APPELLATE JURISDICTION 1

II.

THE RECORD BEFORE THE TRIAL COURT AT THE TIME OF ITS JANUARY 10, 1996 ORDER DENYING SUMMARY JUDGMENTS TO SEVERAL CONSPIRATORS WAS THE SAME RECORD THAT WAS BEFORE THE TRIAL COURT WHEN IT GRANTED SUMMARY JUDGMENT TO EIT .. 3

III.

THE PROPER CHARACTERIZATION OF A SHERMAN ACT CONSPIRACY INVOLVING DISTRIBUTORS THAT IS JOINED BY SUPPLIERS AS HORIZONTAL AND NOT VERTICAL IS FUNDAMENTAL AND SHOULD BE CLARIFIED AS REFLECTED IN *KHAN V. STATE OIL CO*..... 5

CONCLUSION 6

TABLE OF CITATIONS

Supreme Court Cases

Albrecht v. Herald Co., 390 U.S. 145 (1968) 5

Arizona v. Maricopa County Medical Society, 102 S.Ct. 2466 (1982) 5

Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 100 S.Ct. 1460 (1980) 2

Khan v. State Oil Co., 93 F.3d 1358 (7th Cir.), cert. granted, ___ U.S. ___ (1997) 5

Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 111 S.Ct. 401 (1990) 5

U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811 (1940) 5

Federal Cases

Ebrahimi v. City of Huntsville Board of Education, 114 F.2d 162 (May 9, 1997) 1, 2

Union Oil of California v. John Brown E&C, 121 F.3d 305 (7th Cir. 1997) 1

Statutes

15 U.S.C. §1 5

28 U.S.C. §1291 1

Miscellaneous

Wright & Miller, Federal Practice and Procedure, CV Section 2659 2

Rule 54(b) F.R.Civ.P. 1, 2, 4

TABLE OF CITATIONS – Continued

Scalia, *"The Rule of Law As A Law of Rules,"* 56 U. Chi. L. Rev. 1175, 1178 (1989)..... 2

U.S. Law Week p. 3289 10/21/97 5

I.

THE NINTH CIRCUIT'S ALLOWANCE OF PIECEMEAL APPEALS IS IN CONFLICT WITH RECENT ELEVENTH CIRCUIT AND SEVENTH CIRCUIT DECISIONS DISMISSING PIECEMEAL APPEALS FOR LACK OF APPELLATE JURISDICTION

In its response EIT argues that the Ninth Circuit's allowance of a piecemeal appeal by EIT is proper under Rule 54(b) because the reasons for the Rule 54(b) judgment, though not articulated by the District Court, were "obvious from the face of the complaint." Brief In Opposition, page 7. The reasons are not obvious from the face of the complaint. Indeed, EIT was unable (and did not try) to articulate any "obvious" reasons to the District Court, the Ninth Circuit or this Court. Rather, the record in this case presents exactly the procedural context in which piecemeal appeals are inappropriate as recognized by the Eleventh Circuit. The Eleventh Circuit in *Ebrahimi v. City of Huntsville Board of Education*, 114 F.3d 162 (May 9, 1997), was emphatic that where a sound basis for use of Rule 54(b) is not expressed, the Court has little choice but to dismiss the appeal for lack of appellate jurisdiction. 114 F.3d at 166-167. Recently, in *Union Oil of California v. John Brown E&C*, 121 F.3d 305, 311 (7th Cir. 1997), the Seventh Circuit, also in conflict with the Ninth Circuit, rejected a piecemeal appeal. (The Seventh Circuit rejected the notion that the policy against piecemeal appeals may be avoided under 28 U.S.C. §1291 or under Rule 54(b) at the whim of the plaintiff.)

"The district court should make the express determination [that there is no just reason for delay] only in the infrequent case in which a failure to do so might have

a harsh effect." Wright & Miller, Federal Practice and Procedure, CV Section 2659. The District Court in the case at bar made no finding of any adverse effects that might be caused by delay in entry of the judgment. Further, there is no ability to make such a determination simply from the complaint. In short, there are no harsh effects that necessitated use of Rule 54(b).

This Court has emphasized that to avoid piecemeal appeals caution should be exercised to make specific findings before entry of judgment under Rule 54(b). See, *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 100 S.Ct. 1460 (1980). The Ninth Circuit must be directed to honor this rule of law. See, Scalia, *"The Rule of Law As A Law of Rules,"* 56 U. Chi. L. Rev. 1175, 1178 (1989).

In the case at bar, EIT's piecemeal appeal was allowed by the District Court and the Ninth Circuit at a time that EIT had a counterclaim pending and the conspiracy claims raised in the complaint against EIT were still pending against other defendants to whom the District Court denied summary judgment. The District Court made no express finding as required by the plain language of Rule 54(b) and as mandated by the Eleventh Circuit in *Ebrahimi v. City of Huntsville Board of Education*, 114 F.3d 162 (May 9, 1997). At the time the District Court entered respondents' Rule 54(b) judgments, at the very least there should have been "at least one . . . claim or all the rights and liabilities of at least one party" finally adjudicated. Wright & Miller, Federal Practice and Procedure, CV Section 2659, p. 18,205. That was not the situation. At the time of entry of the Rule 54(b) judgment for EIT, the same claims were still pending against other conspirator defendants and EIT still had a counterclaim

pending. Because the Ninth Circuit asserted appellate jurisdiction to adjudicate the piecemeal appeal by EIT outside the context of the remainder of the case, the court apparently succumbed to the same erroneous and unsupported argument that EIT makes to this Court: that the allegations and record before the District Court described only a vertical relationship rather than an ongoing horizontal conspiracy.

II.

THE RECORD BEFORE THE TRIAL COURT AT THE TIME OF ITS JANUARY 10, 1996 ORDER DENYING SUMMARY JUDGMENTS TO SEVERAL CONSPIRATORS WAS THE SAME RECORD THAT WAS BEFORE THE TRIAL COURT WHEN IT GRANTED SUMMARY JUDGMENT TO EIT

EIT makes a frivolous argument that the record that was before the trial court when it granted summary judgment to EIT in September, 1995 did not have the same conspiracy evidence in it as did the record on January 10, 1996 when it denied summary judgment to other conspirators. EIT does not (and cannot) cite or refer to a single fact that was allegedly made part of the record after judgment was entered in favor of EIT.

In the January 10, 1996 Order the District Court found sufficient evidence for a jury to find the existence of a horizontal conspiracy. The District Court cited the record it relied upon for its January 10, 1996 determination, which in large part were the "Scuba Retailer" publications of defendant SRA. The Court cited and quoted those publications at page 10 of its Order. (1/10/96 Order

p. 13). Those "Scuba Retailer" publications were part of the record before the District Court when EIT's motion for summary judgment was pending. Those publications were attached as exhibits to the deposition of Robert Holston which was taken May 9, 1995 and which was attended by counsel for respondent EIT. The deposition of Holston and the exhibits were filed as part of the record before the District Court with Plaintiff's opposition to EIT's motion for summary judgment on August 28, 1995. (See Docket Entries 108-110). That deposition of Mr. Holston and the exhibits thereto were discussed and quoted at length at pages 13-17 of Plaintiff's memorandum in opposition to EIT's motion for summary judgment. (Docket Entries 108-110). Accordingly, the factual basis for the Court's Order of January 10, 1996 was part of the record and before the District Court as part of Plaintiff's opposition to EIT's Motion for summary judgment.

Indeed, EIT's false argument that the complete record was not before the District Court when it granted EIT's summary judgment motion highlights the danger of piecemeal appeals and why they are highly disfavored. Certiorari should be granted to correct the lower court's allowance of piecemeal appeals and the lack of compliance with F. R. Civ. P. Rule 54(b).

III.

THE PROPER CHARACTERIZATION OF A SHERMAN ACT CONSPIRACY INVOLVING DISTRIBUTORS THAT IS JOINED BY SUPPLIERS AS HORIZONTAL AND NOT VERTICAL IS FUNDAMENTAL AND SHOULD BE CLARIFIED AS REFLECTED IN *KHAN v. STATE OIL CO.*

This Court recently heard argument in *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir.), *cert. granted*, ___ U.S. ___ (1997), which involves application of the *per se* rule to a maximum vertical price fixing case (U.S. Law Week p. 3289 10/21/97). On November 4, 1997 this Court unanimously ruled for the defendant and reversed its earlier decision in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). The *per se* rule will not apply to vertical maximum price fixing. However, the *per se* rule does remain applicable to horizontal maximum price fixing. See, *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466 (1982). Moreover, the *per se* rule plainly applies to non-maximum horizontal price fixing. See, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 111 S.Ct. 401 (1990); *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811 (1940).

This Court's recent decision in *Khan*, highlights the importance of the legal significance between horizontal and vertical restraints. That distinction was disregarded by the Ninth Circuit and the District Court in the case at bar. This case presents an excellent vehicle to further clarify, in the wake of *Khan*, the distinction between the rules applicable to horizontal restraints and the rules applicable to vertical restraints under Section One of the Sherman Act, 15 U.S.C. §1.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, Petitioner respectfully urges that the Petition be granted.

Respectfully submitted,

JOHN C. BUTTERS
Attorney for Petitioner
P.O. Box 7129
Atlanta, GA 30357-0129
(404) 872-5693
(404) 876-3331 (Fax)
(*Counsel of Record*)

JAMES F. PONSOLDT
Of Counsel
Univ. of GA.
School of Law
Athens, GA 30602
(706) 542-5209